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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 407

BEN HERBERT PHELPER, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The State of Texas files this its response to the Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas in this cause.

JURISDICTION

Petitioner invokes the jurisdiction of this Court on the basis of 28 U.S.C., Section 1257(3). Respondent asserts that no substantial federal question is presented herein for review.

QUESTIONS PRESENTED

I.

Whether or not Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the fruits of

the search based upon a written consent to search executed by Petitioner.

(a) Was Petitioner entitled to have the question of his consent to search considered by the Texas Courts in light of his assertion of involuntariness?

(b) Did the State of Texas sustain the burden of proving that the written consent to search Petitioner's home was free and voluntary?

II.

Whether or not under the Fourteenth Amendment to the Constitution of the United States, the trial court was required to make an independent finding on the issue as to whether or not Petitioner voluntarily consented to the search of his home; and if so, whether such an independent finding was in fact made.

III.

Whether or not the conviction was so lacking in evidentiary support as to constitute a violation of Petitioner's due process rights under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This is printed in Appendix B of Petitioner's Writ of Certiorari.

STATEMENT OF THE FACTS

A. Procedural History of the Case

Petitioner was convicted under Article 527, Texas Penal Code, for unlawfully and knowingly having in his possession obscene pictures, his punishment being

assessed after a trial by jury at a fine of $1,000. His conviction was affirmed by the Court of Criminal Appeals of Texas, the court of last resort in Texas having jurisdiction over criminal matters. Petitioner has duly and timely filed his Petition in this Court seeking a review of such conviction.

B. Preliminary Statement of the Facts

(As has been pointed out by counsel, a distinction is made in Texas practice between the Statement of Facts, which denotes trial testimony, and the Transcript, which includes the papers filed with the clerk of the court. All references hereafter to the Statement of Facts will be denominated S.F., and to the Transcript, Tr.) The evidence introduced by the State and found by the jury, rather briefly summarized, is as follows:

On November 7, 1963, Officer Robert C. Smith of the Richardson, Texas, Police Department was introduced by a Martin Howard to the Petitioner, Ben Phelper. This introduction and meeting took place in Richardson in the Sun Drugstore, where Howard was employed as a clerk (S.F. 9-10). Smith had received a complaint concerning Phelper, and the two "struck up" a conversation there in the drugstore. Phelper, at the time, was reading a Playboy magazine, and the conversation turned to the subject of photography. Phelper invited Smith to his home to view some of Phelper's photographs with a view towards an outlet for sale or distribution of them (S.F. 10-11). Prior to this time, Phelper had known that Smith was employed as a police officer by the Richardson Police Department, and this fact entered into the conversation (S.F. 11-12). The next day, November 8, was Smith's first opportunity to visit Phelper in his home, and he called

Phelper to confirm the invitation and ask if it would be all right if he brought his partner, Lieutenant Robbins, with him. Phelper's phone number was unlisted and he had given him the number the day before. While visiting there in Phelper's home, Smith and Robbins discussed the subject of photography for approximately an hour, after which the three went into Phelper's study where they were shown approximately one hundred to two hundred slides of various girls. One of the slides which they viewed showed a woman with her pubic hair exposed (S.F. 14-16), which was considered obscene by Smith (S.F. 137).

On December 5, 1963, Smith again visited Phelper's home for the purpose of looking at more pictures before they were to be sent to "Mr. Garrett," the pseudonym of a Federal Postal Inspector to whom Phelper had been mailing such pictures. Smith was dropped off at the Phelper home by Sergeant Lawrence of the Richardson Police Department; and during the visit, Smith was shown series pictures of girls, i.e., several shots of the same girl in sequence of undressing. Some of these pictures were different from the ones that had previously been exhibited to him (S.F. 17-18).

Reverting to the events transpiring between November 7 and December 5, Smith, as a result of the first meeting, called Postal Inspector R. H. Robinson to "establish a buyer" for the pictures; whereupon Postal Inspector Robinson set up a name, Gilbert Garrett, of Rockwall, Texas, to correspond with Ben Phelper in regard to the sale of pictures (S.F. 19-20).

The second meeting, that of December 5, lasted approximately three hours; and during that time, Smith, together with Officer Lawrence, was shown some more

pictures (S.F. 21-24), three or four of which were obscene (S.F. 139).

Prior to January 22, the date of the events complained of by Petitioner, Smith saw Phelper on two or three more occasions, at one of which there was a further discussion of Phelper's sending Gilbert Garrett more pictures (S.F. 24-25).

On January 22, Detective Smith, Postal Inspector Harry D. Holmes, Postal Inspector Robinson and Richardson Police Detective Burleson all went in an automobile to the Sun Drugstore in Richardson where they encountered Phelper. As Smith and Holmes were leaving the drugstore, they began chatting with the Petitioner, and as they left, he asked them where they were going. They said they were going to have some coffee, and he followed them to the front of the drugstore, whereupon Holmes asked him if he would like to have some coffee with them. Phelper replied that he would and he followed them into the car (S.F. 42). As he got into the car, the two postal inspectors identified themselves to Phelper as being postal inspectors (S.F. 26-28). They all drove to the police department and proceeded into an office where they had coffee for about ten minutes, whereupon Holmes displayed to Phelper the pictures that had been sent by Phelper through the mail to him (S.F. 28-29). Postal Inspector Holmes then informed Phelper that he had been under investigation, explained to him that he was a federal officer, and warned him of his rights under the Federal Rules of Criminal Procedure (S.F. 30, 188, 222, 313-314, 369-370, 353). This warning consisted of a statement that Phelper was not required to make any statement whatever, but that any statement he made could be used in evidence against him, and that he was en-

titled to assistance of counsel at this stage. (During the testimony at this stage of the trial, the jury was retired.)

Phelper had been to the police station on a previous occasion for coffee (S.F. 36).

During this time, and until the questioned permission to search was signed and the search had been completed, Phelper was not under arrest (S.F. 37, 39, 76, 150). On several occasions he considered leaving during this time, but decided not to (S.F. 88). Prior to the time the officers began discussing with Phelper the details of the pictures, there was a conversation of indeterminate length between Holmes and Phelper about their war experiences (S.F. 37-38). These events all occurred between 4:30 and 5:30 p.m. of January 22, 1964. At approximately 5:30 on that day, Postal Inspectors Holmes and Robinson began discussing with Phelper the matter that had been mailed to Robinson through the mail by Phelper, and Robinson informed Phelper that he desired to search his house. Phelper, in reply, was quite agreeable and said words to the effect of "Well, you've got the goods on me. Come on down and see the rest of it." Thereupon, he proceeded to sign the permission to search, reproduced as State's Exhibit 3 (Exhibit S.F. 3). The waiver was signed long prior to the time of the search (S.F. 93-95). The officers and Phelper then left the Police Department and proceeded to Phelper's home. The five entered the house, Phelper first, and met Phelper's wife, Louise Phelper, coming out of the kitchen. Phelper requested that he be allowed to discuss this with his wife in order to calm her down and went with her and had a private conversation with her in the kitchen which lasted from fifteen to forty-five minutes (S.F. 75, 78, 191, 226-227).

The kitchen had a back door opening to the outdoors (S.F. 389). After the private talk with his wife, the Petitioner returned to the living room and told the officers to "go ahead" (S.F. 75).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WERE NOT VIOLATED BY THE ADMISSION OF THE OBSCENE PHOTOGRAPHS OBTAINED AS A RESULT OF THE SEARCH BASED UPON PETITIONER'S WRITTEN PERMISSION TO CONDUCT SUCH SEARCH.

A. Petitioner argues that the purported illegality of his arrest should have been examined and determined by the Texas Courts in light of this Court's opinion in *Wong Sun v. United States,* 371 U.S. 471, and the holding of the United States Court of Appeals for the Fifth Circuit in *Collins v. Beto,* June 18, 1965, — F.2d —. *Wong Sun,* of course, was a federal prosecution; and quite apart from the question of its applicability to State prosecutions (which is unclear), it is Respondent's position herein that, upon the facts of the case, even if the arrest were "tainted," the events preceding and subsequent to the execution of the permission to search dissipated any such taint.

However, the evidence shows that Petitioner was not, in fact, arrested by the State or Federal officers until after the search had been completed, many hours after the execution of his permission to search. Petitioner himself testified that he had considered on sev-

eral occasions leaving the police station, but had decided not to. This is a strong indication that, both subjectively and objectively, Petitioner was not, at the time of the execution of the waiver, under arrest.

Even so, as in *Wong Sun,* the Court after examining the relevant facts, must necessarily conclude that, had the arrest been a "tainted one," the events surrounding the incident would serve to vitiate any such taint. These facts and circumstances, in contrast to the facts surrounding the arrest, search and confession of Petitioner Toy in *Wong Sun* are as follows:

1. The officers, both Federal and State, had received reliable information that Phelper was in possession of large numbers of obscene photographs, and that these were located in his home. This information was obtained as a result of the view of certain of these photographs by Officer Smith and the mailing of same to the Postal Inspectors by Phelper.

2. Based upon such reliable information, the officers, both State and Federal, could have obtained, upon ample reasonable basis and probable cause, both warrants of arrest and search for Phelper.

3. There was never any misrepresentation by any of the officers as to their identity as such. Phelper knew at all times that Officer Smith was a Richardson, Texas, Police Detective and that Robinson and Holmes were Federal Postal Inspectors.

4. Before executing the consent complained of, Phelper was given the standard federal warning by the Postal Inspectors.

5. No force was ever used on Phelper to induce him to come to the police station with the officers. The evidence (S.F. 42) shows that the trip to the police

station was made at Phelper's request. He was never hand-cuffed nor otherwise restrained.

6. After the consent was executed and the officers had accompanied Phelper to his home, Phelper had a lengthy, private conversation with his wife.

7. After such conversation, Phelper gave oral permission to the officers to go ahead and conduct the search.

The Court of Criminal Appeals, in giving effect to the permission to search, no doubt considered each of these factors in arriving at its conclusion. In view of this, Respondent strongly urges that each of these factors, and all of them taken together, would effectively serve to vitiate any purported taint arising from the events at the police station.

B. Since the permission to search was relied upon by the State as evidence of its right to search, the cases of *Mapp v. Ohio,* 367 U.S. 343 and *Ker v. California,* 374 U.S. 23, have no application here. Petitioner's question as to whether the state sustained its burden of showing that the permission was executed voluntarily is amply answered by the Statement of Facts supported by references to the record above.

II.

PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE STATE'S MANNER OF PROOF OF PETITIONER'S VOLUNTARY CONSENT TO THE SEARCH OF HIS HOME.

Petitioner seeks to extend the doctrine of *Jackson*

v. Denno, 278 U.S. 368, from the field of confessions to the facts of the present case, i.e., voluntary consents to search. Such an extension is wholly unwarranted and unsupported by the Court's opinion in *Jackson* and should not be made.

Even so, the actions of the court demonstrate conclusively that all of the safeguards erected by this Court in the area of confessions were effectively granted to Petitioner in this case by the actions of the trial court. On page 31 of the Statement of Facts, during the testimony of Officer Smith, upon motion of defendant, the jury was retired in order that the Court might hear evidence "for the purpose of determining the validity of any process by which this man's house was searched." Following this and out of the presence of the jury, Smith testified as to the facts surrounding the execution of the consent as did Phelper, his wife and Inspector Robinson. During this time, the facts relating to the execution of the consent were fully inquired into by all parties. Subsequent thereto, as is reflected by the opinion of the Court below, when petitioner had objected to the admission in evidence of the photographs on the ground that the affidavit for the search warrant was void, the Court stated "We are not operating on that, Mr. Benavides. I think I have made that pretty clear," thus indicating that the Court had made whatever independent finding may be considered necessary by Petitioner and had allowed the introduction of the obscene photographs on the basis of the written permission to search. The Court, on numerous other occasions during the trial, in response to Petitioner's objections, ruled in favor of their admissibility (S.F. 110, 114, 123, 128, 193, 197, 202, 257). Indeed, since in Texas the question of the validity of a search is one of law for the court to decide

initially, *Broyles v. State,* 110 Crim. Rep. 77, 7 S.W. 2d 555; *Alexander v. State,* 116 Crim. Rep. 256, 32 S.W. 2d 204; *White v. State,* 119 Crim. Rep. 338, 45 S.W. 2d 225; *Corley v. State,* 150 Crim. Rep. 107, 199 S.W. 2d 782; *Beevers v. State,* 151 Crim. Rep. 455, 209 S.W. 2d 175, reh. den., and the burden of proof thereon rests upon the prosecution, *Frazier v. State,* 119 Crim. Rep. 217, 43 S.W. 2d 597; *Scott v. State,* 139 Crim. Rep. 210, 139 S.W. 2d 787; *Compton v. State,* 148 Crim. Rep. 204, 186 S.W. 2d 74, the trial judge must of necessity have determined in his own mind not only that the consent was voluntary but that it was so beyond reasonable doubt. Thereafter, following the inquiry into the facts of the execution of the consent in the absence of the jury and the Court's determination of its voluntariness, the Court then submitted an appropriate instruction to the jury relative to the execution of the waiver and consent that if they believed from the evidence or if they had a reasonable doubt thereof, that Phelper did not willfully give his consent to the search prior to the time of the search, or if he signed such waiver as a result of threats or after he was told by the officers that they had a search warrant, that they must wholly disregard the pictures in question and render a verdict of acquittal. Thus, even should the doctrine in *Jackson* be extended to cover the facts in this case, it is abundantly clear that all of the safeguards therein required were amply met by the actions of the trial court.

Further, Petitioner seeks to convince this Court that "in light of the product of the search which consisted of photographs of nude men and women together, it is in fact extremely doubtful that impermissible considerations could not come into play." No evi-

dence is offered by Petitioner on this assertion, but it is Respondent's position, that in view of the very light penalty assessed, consisting of only a fine without imprisonment, it should be plain that no impermissible considerations did in fact come into play.

III.

THE CONVICTION WAS NOT LACKING IN ANY PARTICULAR IN EVIDENTIARY SUPPORT SO AS TO CONSTITUTE A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

By this point, Petitioner seeks to complain that there was no evidence introduced in the trial that the photographs in question were in fact obscene, presumably relying upon the Court's definition of such in *Roth v. U.S.,* 354 U.S. 476, and *Alberts v. California,* 354 U.S. 476. The Court below considered this contention and rejected same noting that when testimony was offered by the State as to what the pictures portrayed, Petitioner objected on the grounds that the pictures spoke for themselves. We agree. On at least four occasions, the State sought to introduce evidence that various of the pictures were obscene (S.F. 193-194, 203, 389, 16). In addition, Officer Smith (S.F. 18) did testify that one of the pictures was obscene. The originals of the photographs have been forwarded to the Court for its inspection, and without going into unnecessary detail on such photographs, Respondent will merely state its position that such pictures showing men and women in the nude engaged in acts of sexual intercourse and other lewd acts are clearly obscene as that term has been defined by this Court.

CONCLUSION

Wherefore, Respondent prays that the judgment of the Court of Criminal Appeals of Texas, in Cause No. 37,771, be affirmed and that Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fenner, Assistant Attorney General of Texas, Attorney for Respondent, certify that a copy of the above and foregoing Response to Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas has been served on Petitioner by mailing same to the following address: Charles W. Tessmer, Emmett Colvin, Jr., Attorneys at Law, 706 Main Street, Suite 400, Dallas, Texas, 75202, Attorneys for Petitioner, this the 19 day of November, 1965.

Howard M. Fenner

Assistant Attorney General